

## 7 PERC ¶ 14089

### HEERA UNIT DETERMINATION - LLNL SCIENTISTS AND ENGINEERS

California Public Employment Relations Board

**In the Matter of: Unit Determination for Professional Scientists and Engineers,  
Lawrence Livermore National Laboratory, of the University of California Pursuant  
to Chapter 744 of Statutes of 1978 (Higher Education Employer-Employee Relations  
Act)**

Docket No. SF-PC-1001-H et al.

Order No. 246b-H

March 8, 1983

HEERA Unit Determination (LLNL Scientists and Engineers)  
Before Tovar, Jaeger, Morgenstern and Burt, Members\*

**Unit Determination -- Supervisory Employees -- Front Line Supervisors -- -- 16.32, 33.42** Research laboratory's "front-line" supervisors, including group or section leaders, project engineers, teams leaders and principal investigators, were not supervisory employees within meaning of HEERA where they had limited input into hiring, transfer and promotion, and evaluation and merit wage procedures. Further their authority in disciplinary matters was limited to issuance of verbal warnings that amount only to informal counseling. Moreover, their authority to resolve grievances did not extend beyond informal level.

**Unit Determination -- Supervisory Employees -- Authority To Dismiss Probationary Employees -- -- 16.32, 33.42** Employees who issued evaluations that effectively determined whether probationary employees in research laboratory would be discharged or retained were supervisory employees within meaning of HEERA.

**Unit Determination -- Supervisory Employees -- Performance Of Unit Work -- -- 16.32, 33.42** Where evidence showed that employees alleged to be supervisory employees within meaning of HEERA spent substantial portion of their time performing work similar to that performed by subordinates, mere fact that they occasionally issued evaluations that effectively determined whether probationary employees would be retained or discharged did not warrant supervisory designation.

**Unit Determination -- Managerial Employees -- Sole Or Shared Authority -- -- 16.21, 33.41** Employees who were solely responsible for overall operation of units within research laboratory were managerial employees because, as sole managers, they exercised significant and independent authority and judgment in both formulating and administering programs. However, employees who shared with others responsibility for operation of units were not managerial employees.

#### APPEARANCES:

Philip E. Callis, Attorney for California State Employees Association; Douglas H. Barton, Attorney (Corbett, Kane, Berk & Barton) and James N. Odle, Associate Counsel for the Regents of the University of California.

## DECISION

On September 30, 1982, the Public Employment Relations Board (PERB or Board) issued a decision<sup>1</sup> under the Higher Education Employer-Employee Relations Act (HEERA)<sup>2</sup> creating a bargaining unit of professional scientists and engineers at the Lawrence Livermore National Laboratory (LLNL or laboratory) of the University of California (UC). A hearing was held to determine which employees or classifications should be excluded from the unit as managerial, supervisory, confidential or casual. It soon became apparent that the development of the record for this and other UC units would be an unduly lengthy and complex process since a total of approximately 7,000 exclusionary issues were involved. As a result, on August 4, 1982, during the testimony concerning the LLNL professional scientists and engineers unit, the Board ordered the hearing suspended pending further procedural orders. *Unit Determination for Employees of the Regents of the University of California* (8/4/82) PERB Order No. Ad-114b-H.

Thereafter, on August 12, 1982, the director of representation issued a pre-hearing notice and order for investigation, production of documents, and hearing. See *Unit Determination for Employees of the Regents of the University of California (Exclusionary Phase)* (9/14/82) PERB Order No. Ad-114c-H. This order directed UC to submit declarations and relevant supporting documents to support each whole classification and/or individual employee exclusionary claim. The order provided that the documentation submitted by UC should be legally sufficient to constitute its case-in-chief for all disputed classifications and employees.

The employee organizations were directed to review the material submitted by UC and to submit counter-declarations and relevant documents where they opposed UC's exclusionary claims. The employee organizations were advised that a failure to file counter-declarations would be deemed a waiver of opposition to the claim unless opposition was stated on the ground that a prima facie case was not established by UC. The parties were then advised that PERB would examine the disputed claims on the basis of the totality of materials submitted by the parties to determine whether a sufficient case was presented for decision by the Board, or whether further investigation or formal hearing would be required to resolve disputed issues of fact.

As a result of the procedural history described above, the record for decision in the professional scientists and engineers unit consists of a combination of hearing transcripts and exhibits, and declarations and supporting documents submitted by UC and the California State Employees Association/Society of Professional Scientists and Engineers (CSEA). CSEA submitted only 15 counter-declarations. Its case mainly consists of its argument that the declarations submitted should be allowed. As discussed, *infra*, the declarations and the record as a whole in some cases support and in some cases do not support the exclusion of employees from the unit.

The parties have stipulated to the fact that there are approximately 7,500 LLNL employees and to the inclusion of 3,205 of these employees in the LLNL professional scientist and engineers unit. The parties have also stipulated to the exclusion of 325 employees from the unit as managerial, supervisory or confidential. These are listed in Appendix A attached hereto [omitted]. (The appendix is based upon stipulations dated November 17, 1982 and February 7, 1983.) These stipulations are approved by the Board based upon the record in this proceeding, including testimony in the exclusionary hearing transcripts and declarations submitted to PERB by the UC on September 27, October 1 and October 14, 1982.<sup>3</sup>

## DISCUSSION

The terms "managerial employee" and "supervisory employee" are defined in subsection 3562(1)<sup>4</sup> and section 3580.3,<sup>5</sup> respectively.<sup>6</sup> The statutory language of these sections of HEERA essentially parallels the definitions of managerial and supervisory employees found in the State Employer-Employee Relations Act (SEERA).<sup>7</sup> In resolving the exclusionary issues in dispute, we find no reason to depart from the Board's conclusions regarding exclusionary issues set forth in *Unit Determination for the State of California Pursuant to Chapter 1159 of the Statutes of 1977*

*(State Employer-Employee Relations Act)* (12/31/80) PERB Decision No. 110c-S, 5 PERC 12014.8

Thus, we conclude that UC has an interest in being assured of a cadre of employees whose loyalty will not be compromised by concurrent obligations to the interests of those employees who are entitled to negotiate wages, hours, and terms and conditions of employment. Nevertheless, the burden of proving an exclusionary claim rests with the party asserting it.<sup>9</sup> Absent that burden being met, the employees in dispute are to be included in the unit. Stipulations of fact submitted by the parties are accepted as conclusive.

### *Supervisory Employees*

With respect to supervisory exclusion issues, we continue to apply the disjunctive interpretation of section 3580.3.<sup>10</sup> If UC demonstrates that an employee meets one of the specified criteria for exclusion and does no rank-and-file work, the employee will be excluded from the unit. However, most circumstances do not fit this extreme case. Where other factors are involved, the following caveats apply.

Section 3580.3, like section 3522.1 of SEERA, clearly authorizes the Board to include in representation units employees who perform some supervisory functions. These employees, despite titles, job descriptions and even duties, may be sufficiently invested with rank-and-file interests to warrant their inclusion in bargaining units. This will occur where control is demonstrated only over work processes as distinguished from personnel policies and practices. The conflict of interest to be prevented is the division of supervisors' loyalties that might occur because of the negotiating relationship of the parties, concerned as it is with wages, hours and working conditions. The potential for this conflict lies in the authority to control or influence personnel decisions on matters falling within the scope of representation, as opposed to work processes.

Employees with control over work processes are often called "lead" employees. These employees may also perform some supervisory personnel functions, although the bulk of their duties are substantially similar to those of their subordinates. Such employees may also be included in the unit. Their guidance of other employees is derived from greater experience, technical expertise and knowledge of the employer's mission and tasks. The important measure in such cases is the point at which the employees' supervisory obligation to the employer outweighs their entitlement to the rights afforded rank-and-file employees.

This point is not determined merely by quantitative analysis. Even though they spend part of their time performing the work of subordinates, their involvement in one or more supervisory functions may conflict with their participation in rank-and-file unit activity. The existence of such supervisory obligations precludes a finding that the disputed employees' duties, overall, are "substantially similar" to those of their subordinates.

Employees who perform some supervisory functions may also be included in the unit if their exercise of authority does not require the use of independent judgment, but is merely routine or clerical in nature. Independent judgment is indicated where the performance of the duties includes the opportunity to make a clear choice between two or more significant alternative courses of action and the power to make that choice is without broad review and approval. Such functions are characterized by significant autonomy and control over the decision-making or recommending processes. On the other hand, the exercise of authority is of a merely routine or clerical nature where the action is limited to choosing between two or more tightly directed and narrowly defined procedures. In addition, there may be substantial review or prior approval of the alleged supervisory act, either by specific action or existing policy, thereby precluding any finding of independent judgment.

Finally, employees who perform some supervisory duties may be included in the unit if the exercise of the duties is sporadic and atypical.

In the instant case, the Board's analysis according to the foregoing principles established in the SEERA unit determination decision has been complicated because the record provides few direct facts regarding the amount of time the employees in issue perform duties substantially the same as those of their subordinates, whether such subordinates are members of the same bargaining unit, or whether the exercise of supervisory duties is sporadic and atypical or requires the use of independent judgment. Absent these facts, the evidence must be conservatively approached. Thus, the point at which an employee's supervisory obligation to the employer outweighs the entitlement to the rights afforded rank-and-file employees will be reached only where the record indicates the substantial performance of supervisory duties. Additionally, certain supervisory duties may indicate a serious potential for a conflict of interest with bargaining unit members and thus require the exclusion of the employee.

### *Managerial Employees*

Although section 3562(1) is written in the disjunctive, the Board concludes that a managerial employee must possess significant responsibilities for both formulating *and* administering policies and programs.<sup>11</sup> The formulation of policy contemplates the exercise of discretionary authority to develop and modify institutional goals and priorities. The administration of programs contemplates effective implementation of the policy through the exercise of independent judgment. Thus, managerial status contemplates those persons who have discretion in the performance of their jobs beyond that which must conform to an employer's established policy. The question as to whether particular employees are managerial must be answered in terms of the employees' actual job responsibilities, authority and relationship to the employer.<sup>12</sup> Employees who exercise discretion only within areas of technical expertise are not managerial.<sup>13</sup>

## **ORGANIZATION OF**

### **LAWRENCE LIVERMORE LABORATORY**

An overview of the laboratory's organization is essential in order to accurately apply the supervisory and managerial criteria set forth in the statute.

The top position in the laboratory is held by the director. He has ultimate authority over the policies and procedures of the laboratory. Attached to his office is an administrative staff which oversees, among other things, the laboratory's public affairs and budget.

One step below the director in the chain of authority are associate directors. Their responsibilities include coordinating interdepartmental projects, organizing administrative and budgetary programs, and formulating laboratory-wide personnel standards.

Below associate directors are department heads. The laboratory is divided into "program departments" and "support departments." Each "program" department is oriented toward a specific area of nuclear technology. These include magnetic fusion, lasers, military development, and biomedical/environmental research. The "support" departments are organized into areas of scientific expertise. These include engineering, chemistry and computations. The support departments are designed to act as pools of scientific expertise from which program departments may borrow when the need arises. Department heads oversee all projects in their department and are responsible for implementing the laboratory's personnel policies and procedures.

Each department is divided into divisions. Each division works on a segment of the overall departmental project. They are headed by division leaders who report directly to their respective department heads. Division leaders are responsible for hiring, firing, disciplinary and salary decisions. Division leaders review or write performance evaluations and counsel subordinates on career development. Division leaders are also responsible for the overall work of their particular unit.

Divisions are further divided into groups or sections. Each group or section works on a specific problem within the division's assignment. Groups and sections are led by employees with a

variety of working titles. Most are called group leader, but the titles project engineer, team leader, principal investigator and simply "supervisor" also describe the same position, i.e., leader of a group or section. These individuals are sometimes called "front-line" supervisors. They are responsible for the day-to-day work activities of group employees, and provide "hands-on" technical advice and direction. Generally, they are responsible for performance evaluations, salary and hiring recommendations and informal grievances. For the most part, it is these individuals around whom the issues in this case center.

## **EMPLOYEES LISTED IN APPENDIX B**

We find that the employees listed in Appendix B [omitted] do not have sufficient supervisory authority to be excluded from the unit. The record reflects that their duties in the areas of hiring, transfers, promotions, discipline, grievance resolution, performance evaluations, merit salary increases and other functions do not involve true supervisory authority, but reflect lead worker status or involve the routine control of work processes.

### *Hiring*

Hiring at the laboratory is initiated by the personnel manager acting in response to a request or recommendation from a department head or division leader. The personnel manager is responsible for selecting from applicants those meeting the stated requirements and qualifications who will be interviewed. The personnel manager also advises the department head or division leader about the laboratory's personnel policies, legal requirements and selection standards.

An applicant may be required to take a written examination or may be orally interviewed by one or several of the following: a member of the personnel department, a department head, a division leader, an employee designated by a department head or division leader, or a panel of interviewers composed of employees and/or individuals from outside the laboratory that are appointed by a department head or division leader. The selection is made by the department head or division leader. They recommend to the personnel manager that a formal offer of employment be made based on a record of their reasons for selecting the successful applicant and rejecting the others. Offers of employment can be made only by the personnel manager.

The record indicates that the employees UC seeks to exclude make recommendations as to the selection of individuals into their work units that are "routinely followed." At first glance, it might appear that these employees make "effective recommendations" with regard to hiring decisions. Upon closer examination, however, this single fact is insufficient to justify a finding that these employees possess true supervisory authority. In the SEERA unit determination decision,<sup>14</sup> the Board declined to afford supervisory status to employees who participated in hiring interviews and made recommendations in hiring matters unless those recommendations amounted to a true exercise of hiring authority. As discussed above, hiring decisions at the laboratory are made after a series of interviews and evaluations by department heads, division leaders, personnel representatives, and, in some instances, individuals from outside the laboratory. Actual hiring decisions are solely in the hands of department heads, division leaders and the personnel manager. Appendix B employees participate in hiring matters only to the extent that they have some input in the process and that input is merely a factor in the final decision. This is not enough to establish that their recommendations are "effective." Absent detailed and explicit evidence that the recommendations of these employees are tantamount to true hiring authority, there is no indication of supervisory authority.

With respect to hiring, the record indicates that five principal investigators have the authority to select, from a pool of applicants, the individual who will be hired into his or her work unit. This fact might also at first glance suggest that these employees should be excluded from the unit on the basis of their power to hire subordinates. However, the evidence also indicates an inconsistent hiring authority. The evidence shows that rarely, if ever, has an employee been hired into the work unit without or against these employees' recommendations. This indicates that the

employees do not in fact have independent authority to hire. For these reasons, it is found that the principal investigators do not have true supervisory authority in the area of hiring.

#### *Transfers and Promotions*

While the laboratory's policy manual encourages employees to speak to their "supervisors" as well as their department head or division leader about voluntary transfers, the process of transfers, including preparation of paperwork, arranging of interviews, and approval of release time for interviews is done by the personnel manager. The applicant must apply to the personnel department for a transfer. A representative of the personnel department refers the applicant to the appropriate department head and/or division leader. If the department head or division leader determines that an applicant appears able to perform the job duties successfully, an interview is scheduled. An applicant may be interviewed by a department head, division leader, supervisor or any other person deemed appropriate. Transfers will not be approved without the consent of the department heads and division leaders involved.

The record indicates that each alleged supervisor's recommendations regarding the transfer of employees into and/or out of the supervisor's work unit are "routinely followed or would be followed." While Appendix B employees may interview transfer applicants and make recommendations about them, there is no showing that they exercise any true authority in these matters. Indeed, the record as a whole shows that the true authority to transfer rests at higher levels. As with the hiring authority, these employees cannot be considered to make effective recommendations in transfer matters sufficient to exclude them from the unit.

Promotions from one laboratory position to another follow the procedures prescribed for transfers, and the participation of Appendix B employees in promotion decisions likewise does not indicate true supervisory authority.

#### *Discipline*

The record indicates that the claimed supervisors have the authority to advise subordinates regarding the level of performance expected of them and to counsel them about performance problems as necessary in the supervisor's judgment. This function reflects laboratory policy which extends to front-line supervisors the power to issue verbal warnings to employees. Verbal warnings, however, carry no punitive result and are not considered corrective action. A front-line supervisor may not take any other corrective action without the prior approval of the department head or division leader. The authority to issue written warnings rests with department head or division leader. In the SEERA unit determination decision,<sup>15</sup> it was found that informal counseling, even if it involves criticism and corrective effort, does not amount to the effective recommendation of discipline.

The claimed supervisors may also place an employee on immediate investigatory leave (suspension without pay while charges of serious misconduct are investigated) whenever an employee's actions are such that they constitute a threat to other employees. The power to place an employee on immediate investigatory leave under these circumstances, however, does not require any special supervisory skills. The act is simply a matter of necessity. It reflects no prescribed supervisory authority, but only the exercise of common sense judgment under difficult conditions. Absent threatening behavior, the advice of a department head or division leader always must be sought before placing an employee on investigatory leave.

In conclusion, nothing in the record establishes that Appendix B employees have true supervisory authority in disciplinary matters. While they may play a minor role in the process, their authority is basically limited to informal counseling functions. The power to discipline employees rests exclusively with department heads and division leaders.

#### *Grievance Resolution*

The record shows that Appendix B employees take action in response to subordinates' complaints and/or resolve the grievances of their subordinates according to their own judgment. However, it

is not indicated whether this occurs at the informal stage or at one of the formal steps of the grievance procedure.

Formal written grievances are processed through the personnel department and heard by a non-University hearing officer or a presumably impartial laboratory hearing committee. It is at these levels that the power to resolve grievances exists.

The authority to informally resolve grievances must be treated like the informal counseling function discussed above. Thus, the resolution of grievances at a level below the first formal step does not indicate true supervisory authority sufficient to require the exclusion of Appendix B employees from the unit.

#### *Performance Evaluations and Merit Salary Increases*

Employees receive periodic written performance evaluations, the frequency of which is determined by their career or probationary employment status. Written evaluations are prepared by an employee's immediate supervisor. Evaluations are intended to give employees and their immediate supervisors an opportunity to discuss job responsibilities, accomplishments, objectives, performance problems and work progress. Performance evaluations may also provide information to department heads or division leaders in personnel decisions regarding promotions, demotions, salary increases, assignments and dismissals.

The record indicates that the vast majority of Appendix B employees are responsible for the performance evaluations of their subordinates. The performance evaluations are then reviewed and may be changed by their supervisors. The evaluations are a factor in awarding annual merit salary increases.

The laboratory has an elaborate salary setting procedure designed to reflect the relative value of employees to their division or department. The procedure involves a series of successive rankings which starts at the group leader level. Department heads and division leaders are ultimately responsible for determining the relative ranks of scientists and engineers in their organization. These ranks are then compared against the ranking decisions made in other departments or divisions.

Once the ranking process is completed, actual assignment of a particular salary is made by a division leader or department head. The employee's salary is compared to a "merit maturity curve" and may again be adjusted to reflect the employee's rank and years of service. Department heads and division leaders, despite this system, retain the right to deviate from the procedures when an employee's final ranking does not precisely reflect his or her value to the laboratory.

Employees are encouraged to resolve any salary concerns with their immediate supervisors. If impasse is reached in such discussions, an employee can ask that the situation be reviewed at a higher level.

With regard to merit increases, the SEERA unit determination decision<sup>16</sup> indicated that "the Board's emphasis has been on the exercise of independent judgment; the routine administration of a well-articulated system or the essential lack of control over the decision-making process has been found insufficient cause for exclusion." A review of laboratory procedures discloses that Appendix B employees' input in merit salary increase decisions is minimal at best. Merit increases are awarded after a series of reviews and rankings by department heads and division leaders. Appendix B employees may have initial input into the process, but their recommendations go through such review and adjustment that their first evaluation often does not reflect the final award. The performance evaluations written by the group leaders also have minimal impact on merit increase decisions. In sum, these employees simply do not have the degree of independent judgment in such decisions to warrant their exclusion.

#### *Other Supervisory Functions*

Finally, the record indicates that Appendix B employees participate in a number of work-related supervisory functions including scheduling of hours and vacations, approving sick leave,

monitoring the quality of subordinates' work, and training subordinates. There is nothing in these duties from which we could conclude that Appendix B employees have control or influence over personnel decisions. These duties appear limited simply to routine or clerical decision-making which does not require independent judgment. The scheduling of vacations is essentially ministerial, based on the convenience of the laboratory, and follows well-defined procedures outlined in the laboratory's policy manual. Sick leave is awarded according to standards also articulated in the policy manual. Training and monitoring the quality of subordinates' work involves merely the routine control of work processes.

In conclusion, based upon the entire record in this case, we find that Appendix B employees lack any true supervisory authority sufficient to exclude them from the unit. Therefore, their inclusion in the unit is appropriate.

### **EMPLOYEES LISTED IN APPENDIX C**

The employees listed in Appendix C [omitted] are excluded from the unit because they are found to exercise true supervisory authority in one area.

The evidence offered by UC regarding the supervisory status of Appendix C employees is similar to that offered for Appendix B employees. However, there is the single significant difference that Appendix C employees play a critical role in the employment status of probationary employees. This fact mandates a different conclusion with regard to their supervisory status.

Appendix C employees participate in the initial hiring of unit employees in the same manner as those in Appendix B. Additionally, employees in both groups are responsible for annual and probationary performance evaluations. These employees prepare the evaluations and deliver them to their subordinates. The evaluations are used to give notice of poor work performance to employees, and additionally as a factor in determining annual merit salary increases. Performance evaluations written by Appendix C employees, however, have an added use. With respect to probationary employees, the performance evaluation is critical to a determination that the probationary employee will either be retained or be discharged from employment. This fact adds a significant dimension to the role of Appendix C employees in the hiring process. It indicates that the performance evaluations, without broad review or approval, are basically determinative of the employment fate of probationary employees and that Appendix C employees do, in fact, make effective recommendations regarding the hiring of probationary employees. Therefore, UC has met its burden in establishing that these employees have sufficient supervisory authority in hiring matters to warrant their exclusion from the unit.

### **EMPLOYEES LISTED IN APPENDIX D**

Employees listed in Appendix D [omitted] are included within the unit. Except as discussed below, the evidence relative to these employees is generally the same as for the Appendix C employees. They are responsible for the preparation and completion of performance evaluations which are critical to the determination of whether probationary employees will become permanent or will be discharged. Appendix D employees, however, perform duties similar to those of their subordinates and thus separate and additional discussion is required.

Group leaders spend 80 percent of their time and project engineers spend 90 percent of their time on technical work as opposed to administrative and personnel duties. The group leaders are viewed as fellow scientists and working leaders primarily engaged in scientific work rather than as supervisors.<sup>17</sup>

As we stated above, section 3580.3 provides that employees whose duties are substantially similar to those of their subordinates shall not be considered supervisory employees. For employees who perform some supervisory duties and some duties similar to those of subordinates, we have rejected a formal rule based on any specific percentage of time spent on rank-and-file work. Instead, we have determined that an appropriate measure is the point at which



the employees' supervisory obligation to the employer outweighs their entitlement to the rights afforded rank-and-file employees. Additionally, where the employees' involvement in supervisory functions conflicts with their participation in rank-and-file unit activity, there cannot be a finding that the employees' duties are substantially similar to those of their subordinates.

We find that Appendix D employees do not have a supervisory obligation to the employer which outweighs their entitlement to the rights afforded rank-and-file employees. These employees are involved in but one supervisory function, and spend 80 to 90 percent of their time performing duties similar to those of subordinates. Such employees' extensive involvement in rank-and-file work clearly outweighs the supervisory function, which may only be sporadically exercised. We see no significant risk that the employees' participation in rank-and-file activities will conflict with their supervisory obligation to the employer where such obligation is limited to their role in determining whether probationary employees will be retained. Accordingly, Appendix D employees are included within the unit.

### **MANAGERIAL EXCLUSIONARY ISSUES**

UC seeks to exclude 63 employees from the unit as managerial. These employees are designated by working title rather than job classification. In the hierarchy of the laboratory, they are below the department and division levels and located at the group and section levels. Thus, they are at the same level in the laboratory hierarchy as the employees addressed in Appendices B, C and D, whom UC seeks to exclude as supervisory. It is not clear from the record why employees at the same level should in some instances be considered to perform supervisory duties and in other instances perform managerial duties.

Some of the 63 employees have already been determined to be at least supervisory and excluded from the unit. Therefore, it is unnecessary to decide the managerial status of these employees.<sup>18</sup> The remaining employees may be distinguished between those who are solely responsible for the overall operation of their unit as contrasted to those who share such responsibility with others. In some cases the shared responsibility is with the employee's superior and in some cases there is no information regarding the persons with whom the employee shares responsibility.

The employees who are solely responsible for the overall operation of their units also have individual responsibility to develop important policies and programs. Additionally, they perform a number of duties indicating substantial responsibility in developing, administering and modifying the unit budget. In contrast, the other claimed managers merely "participate" in the development of policies and programs. While their recommendations concerning the development and administration of the budget for the unit may be routinely followed, there is no indication of significant responsibility.

The Board finds that the employees who are solely responsible for the overall operation of their units should be excluded from the unit as managerial. The record indicates that these proposed managers do in fact possess significant responsibilities for both formulating and administering policies and programs. They exercise discretionary authority in developing and modifying institutional goals and priorities. They exercise independent judgment in administering unit programs. They have discretion beyond that which must conform to an employer's established policy. Additionally, budget responsibilities were found to be an important consideration in determining managerial status in *Berkeley Unified School District* (8/28/79) PERB Decision No. 101, 3 PERC 10112.

Lacking the stronger responsibilities described above, it cannot be concluded that the remaining disputed employees are managerial. There is no showing that the "shared" responsibilities do, in fact, constitute "significant responsibilities" for the formulation and administration of policies and programs. For these employees, UC has not met its burden of proof and the employees therefore must be included in the unit.

In addition to the employees discussed above, there are four employees whom UC seeks to

exclude as supervisory or managerial who are all part of the laboratory's Z-Division. These employees are Fred Jessen, David Dye, John Illige and Fred Kovar. The Z-Division is primarily responsible for providing technical assistance to the United States intelligence community. In the course of their work these employees have significant responsibilities for formulating and administering policies and programs which respond to the needs of various government agencies. These four individuals design, administer and control laboratory programs and, in so doing, have significant authority in budgetary matters. As such, we find them all to possess managerial responsibilities and accordingly exclude them from the unit.

Based on the foregoing discussion, the employees to be excluded from the unit as managerial are listed in the attached Appendix E [omitted], and the employees to be included in the unit are listed in the attached Appendix F [omitted].

## ORDER

Upon the foregoing Decision and the entire record in this case, the Public Employment Relations Board ORDERS that:

- (1) The employees listed in Appendix A, are excluded from the Lawrence Livermore National Laboratory Professional Scientists and Engineers Unit as managerial, supervisory or confidential according to the stipulations of the parties and based upon the factual record in this proceeding.
- (2) The employees listed in Appendices B, D and F, are included in the unit for the reasons stated in the foregoing Decision.
- (3) Those employees listed in Appendices C and E, are excluded from the unit as supervisory or managerial for the reasons stated in the foregoing Decision.
- (4) Any technical errors in this Order shall be presented to the director of representation who shall take appropriate action thereon in accordance with this Decision.

---

\*Chairperson Gluck did not participate in this decision.

**1** *Unit Determination for Professional Scientists and Engineers, Lawrence Livermore National Laboratory, of the University of California Pursuant to Chapter 744 of Statutes of 1978 (Higher Education Employer-Employee Relations Act) (9/30/82) PERB Decision No. 246-H, 6 PERC 13231. See also the decision concerning requests for reconsideration and judicial review, Unit Determination for Technical Employees; Clerical Employees; Service Employees; Professional Scientists and Engineers, Lawrence Livermore National Laboratory; Professional Librarians; and Professional Patient Care Employees of the University of California Pursuant to Chapter 744 of the Statutes of 1978 (Higher Education Employer-Employee Relations Act) (2/4/83) PERB Decision Nos. 241a-H and 244a-H through 248a-H, 7 PERC 14062.*

**2** The HEERA is codified at Government Code section 3560 *et seq.* All statutory references are to the Government Code unless otherwise specified.

**3** The Board does not specifically designate as managerial, supervisory or confidential the employees the parties have agreed to exclude. In the *State Employer-Employee Relations Act, Phase III, Unit Determination Proceeding* (10/18/79) PERB Order No. Ad-79-S, 3 PERC 10133, the Board stated that it:

... views the focus of the Phase III unit determination proceedings to be a determination of those rank and file employees who are to be *included* in the designated appropriate units. However, the burden is on the ... party which may seek to exclude employees from units because of alleged managerial, supervisory or confidential status--to affirmatively justify their exclusion. This can be done

by showing evidence of actual job requirements which would disqualify the subject employees from placement in representation units irrespective of which exclusionary category those employees may fit.

Thus, the Board only approves the exclusion of the employees from the unit, and not the specific basis for the exclusion.

**4** Subsection 3562(1) provides:

"Managerial employee" means any employee having significant responsibilities for formulating or administering policies and programs. No employee or group of employees shall be deemed to be managerial employees solely because the employee or group of employees participate in decisions with respect to courses, curriculum, personnel and other matters of educational policy. A department chair or head of a similar academic unit or program who performs the foregoing duties primarily on behalf of the members of the academic unit or program shall not be deemed a managerial employee solely because of such duties.

**5** Section 3580.3 provides:

"Supervisory employee" means any individual, regardless of the job description or title, having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. With respect to faculty or academic employees, any department chair, head of a similar academic unit or program, or other employee who performs the foregoing duties primarily in the interest of and on behalf of the members of the academic department, unit or program, shall not be deemed a supervisory employee solely because of such duties; provided, that with respect to the University of California and Hastings College of the Law, there shall be a rebuttable presumption that such an individual appointed by the employer to an indefinite term shall be deemed to be a supervisor. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

**6** Managerial employees are excluded from coverage under HEERA in subsection 3562(f). Supervisory employees have limited rights as set forth in section 3580 *et seq.*

**7** The SEERA is codified at section 3512 *et seq.*

"Managerial employee", as defined in section 3513(e) of SEERA, refers to agency or department policies or programs, does not exclude decisions relevant to courses, curriculum, personnel and other matters of educational policy, and does not include reference to department chairpersons. Similarly, "supervisory employees," as defined in section 3522.1 of SEERA, does not contain the department chairperson language of HEERA.

Subsection 3513(e) provides:

"Managerial employee" means any employee having significant responsibilities for formulating or administering agency or departmental policies and programs or administering an agency or department.

Section 3522.1 provides:

"Supervisory employee" means any individual, regardless of the job description or title, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other

employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

**8** *Unit Determination for Employees of the California State University and Colleges Pursuant to Chapter 744 of the Statutes of 1978 (Higher Education Employer-Employee Relations Act)* (9/22/81) PERB Decision No. 173-H, 5 PERC 12120, and (11/17/81) PERB Decision No. 176-H, 5 PERC 12152.

**9** See also *In Re: The State Employer-Employee Relations Act, Phase III, Unit Determination Proceeding* (10/18/79) PERB Order No. Ad-79-S.

**10** The disjunctive interpretation was applied in *Unit Determination for Employees of the California State University and Colleges, supra*, PERB Decision Nos. 173-H and 176-H.

**11** This construction is parallel to the Board's interpretation of the similar definition of "management employee" in the Educational Employment Relations Act (EERA), codified at section 3540 *et seq.* Subsection 3540.1(g) provides:

"Management employee" means any employee in a position having significant responsibilities for formulating district policies or administering district programs. Management positions shall be designated by the public school employer subject to review by the Educational Employment Relations Board.

See *Lompoc Unified School District* (3/17/77) EERB Decision No. 13 at pp. 20-21, 1 PERC 80. Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

**12** *Hartnell Community College District* (1/2/79) PERB Decision No. 81, at 13, 3 PERC 10016; *Berkeley Unified School District* (8/28/79) PERB Decision No. 101, at pp. 3-4, 3 PERC 10112.

**13** *Oakland Unified School District* (3/28/77) EERB Decision No. 15, at pp. 6-7, 1 PERC 137.

**14** *Unit Determination for the State of California, supra*, PERB Decision No. 110c-S, at p. 11.

**15** *Id.*, at pp. 12-13.

**16** *Id.*, at p. 14.

**17** James Day, a project engineer designated by UC as a supervisory employee, additionally asserted that he "views himself as a technical work horse primarily engaged in technical work like everyone else on the project." He further stated that he "also takes care of some administrative details."

**18** Again, as was stated in footnote 3, *supra*, and in the *State Employer-Employee Relations Act, Phase III Unit Determination Proceeding, supra*, PERB Order No. Ad-79-S, the focus of this decision is the determination of those employees who are to be *included* in the unit. The specific basis for the exclusion of an employee, whether it is managerial, supervisory or confidential status, is not relevant for this purpose.

---

